

# Are EU misappropriation sanctions dead?

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On 11 July 2019, the EU's General Court delivered seven analogous judgments in a series of Ukraine-related sanctions cases, including that concerning Ukraine's [ex-president Viktor Yanukovich](#). Yanukovich is best known for fleeing Ukraine for Russia amidst mass protests in early 2014, leaving behind a private zoo and a [mansion](#) with gilded bathrooms.

The General Court struck down the EU's sanctions against Yanukovich and a number of other Ukrainian former public officials. The Court ruled that, in imposing the sanctions based on the fact that a criminal investigation against sanctioned individuals was ongoing in Ukraine, the Council failed to verify whether those individuals' 'rights of the defence and the right to effective judicial protection' had been observed.

Because these cases did not concern the most recent instalment of EU sanctions against the individuals concerned, six out of seven [remain subject to EU sanctions](#) for now. However, the General Court's legal reasoning raises intriguing questions about the future of the EU's misappropriation sanctions.

On the one hand, the General Court requires nothing more of the EU than to abstain from placing blind trust into third countries' judicial systems. On the other hand, complying with this simple prescription may well prove impossible.

To understand why, some context is necessary.

'Misappropriation' sanctions are a type of EU targeted sanctions, formally known as 'restrictive measures'. They involve the freezing of assets and have been used against former public officials from [Tunisia](#), [Egypt](#) and [Ukraine](#) who were suspected of misappropriating public funds and lost power after popular uprisings in those countries.

Unlike other EU sanctions, such as those that target suspected terrorists or rogue regimes, misappropriation sanctions were adopted upon request of respective third countries. In effect, they achieve the same result [as mutual legal assistance proceedings would](#), but without the involvement of domestic courts in EU member states.

In the turbulent times of the Arab Spring and Ukrainian revolution, the EU responded to the political and moral imperative of ensuring that EU assets of respective countries' ruling elites, who were widely seen as corrupt and brutally oppressive, were not dissipated before due process of law took its course in those states.

The inevitable downside was that, short on time, the EU had to take those decisions based on little more than requests written on the back of a napkin, in the hope that those third countries would furnish solid proof of wrongdoing in due course.

In relation to Ukraine, this never really happened. Many of the individuals on the EU's initial sanctions list were never charged with wrongdoing. Some faced indictments for alleged offences unrelated to misappropriation. Yanukovych himself was found guilty in absentia by a Ukrainian court [on charges of treason](#) in connection with Russia's annexation of Crimea.

In the meantime, the General Court's legal stance on misappropriation sanctions has hardened.

In the first Egyptian and Tunisian challenges, [Ezz](#) and [Al Matri](#), the General Court effectively relieved the Council of any obligation to probe the credibility or integrity of the foreign investigations that formed the basis for the EU's misappropriation sanctions.

A change in approach was foreshadowed in [CW](#), where the General Court stated that the Council had to 'examine carefully and impartially the evidence provided to it by the Tunisian authorities', and [Ivanyushchenko](#), where it struck down the sanctions imposed based on the information that was 'either irrelevant, since those proceedings do not concern the misappropriation of public funds, or beset with inconsistencies'.

It took another year for the General Court to enunciate its current approach in [Azarov](#), a December 2018 judgment concerning Ukraine's former prime minister:

The Council cannot conclude that a listing decision is taken on a sufficiently solid factual basis before having itself verified that the rights of the defence and the right to effective judicial protection were respected at the time of the adoption of the decision by the third State in question on which it intends to base the adoption of restrictive measures.

The recent judgments reaffirm this view and, in so doing, place the Council before a dilemma.

The *raison d'être* of misappropriation sanctions is to quickly seize the assets pending a full investigation by the relevant state's authorities. It is difficult to see how the Council can assure itself, amidst the turmoil of a regime change, that the sanctioned individual's 'rights of the defence' have been observed before it imposes the sanctions.

So, are EU misappropriation sanctions dead? It is a time-honoured [law of journalism](#) that if there is a yes-or-no question in a headline, the answer is typically 'no'. Here, in fact, it is 'yes' – but only if one takes the recent judgments as the last word on the matter.

Crucially, they concerned the re-imposition of respective EU sanctions in 2016, rather than their initial enactment. On the face of it, nothing in the General Court's

judgments indicates that it would have taken a different approach to a case concerning the initial imposition of misappropriation sanctions.

But, as its aforementioned case law demonstrates, the General Court treats its jurisprudence as work in progress. With strict legal consistency often displaced by 'common sense' considerations, the General Court may well be loath to strike down EU sanctions imposed in the immediate aftermath of regime change in a third country. And, if such a case came to the General Court, one could perhaps expect it to ratify the initial adoption of sanctions while adopting a much stricter approach to their subsequent re-imposition (as it has, in effect, done so far).

That leads to the obvious observation that misappropriation sanctions are only ever adopted in exceptional circumstances. Ukraine-related sanctions, which date back to 2014 and have been (partly) renewed ever since, are the latest example. So, in several ways, misappropriation sanctions are the oddest fish in the EU sanctions aquarium, and legal developments in relation to them have limited implications for EU sanctions broadly speaking.

In particular, it is worth recalling recurrent discussions about whether the EU should introduce sanctions against [foreign officials suspected of human rights abuse and/or corruption](#) (analogous to the recent legislation in [the US](#) and [Canada](#) named after Sergei Magnitsky, a Russian whistleblower). Such sanctions would rely entirely on the EU's own assessment, not third country requests. Recent 'misappropriation' judgments therefore would not affect their legality and, regardless of the future of misappropriation sanctions, there are further avenues the EU could pursue in developing an anti-corruption sanctions agenda.

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